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*By Marilyn J. Friedman**

A large percentage of licensed professionals in California are regulated by state administrative agencies, which monitor professional conduct through the granting, suspension and revocation of licenses.[1] In recent years, these state agencies have wielded ever-increasing power over certain professional groups.[2] An attorney who must defend against the revocation of his client's license before a state agency is at a great disadvantage in that the tools of discovery, which are readily available to a civil litigant, are of limited use to an accused facing disciplinary proceedings.[3] The state

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1. *See* CAL. GOV'T CODE § 11501(b) (West 1980) for a list of state agencies governed by California's Administrative Procedure Act, CAL. GOV'T CODE §§ 11500-11528 (West 1980). Among those professions specifically enumerated are accountants, architects, barbers, behavioral scientists, chiropractors, dentists, teachers, community college professors, cosmetologists, engineers, doctors and surgeons, embalmers, geologists and geophysicists, landscape architects, psychiatrists, psychologists, nurses, optometrists, osteopaths, pharmacists, real estate brokers, shorthand reporters and veterinarians.

2. The total number of complaints filed against California health care professionals has more than doubled since the State Board of Medical Quality Assurance was formed in 1975 by the state legislature; official investigations of individual health care professionals have risen by more than one-third, and disciplinary actions have multiplied as much as eight-fold. The agency with a staff of 170 and a budget of about $8 million monitors and licenses 14 different health professions, including physicians, acupuncturists, hearing specialists, physical therapists, physician's assistants, psychologists and speech pathologists. *See* Perlman, *State Cracking Down on Doctors*, San Francisco Chronicle, Aug. 11, 1979, at 5, col. 1.

3. CAL. GOV'T CODE § 11507.5 (West 1980) states expressly that "[t]he provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter."

CAL. GOV'T CODE § 11507.6 (West 1980) provides:

"After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the

agency, however, has broad investigatory powers at its disposal through which it can secure complete information and prepare its case before filing the accusation.[4]

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hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including but not limited to reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person, signed or otherwise authenticated by him, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product."

4. *See generally* CAL. GOV'T CODE §§ 11180-11190 (West 1980). The investigatory power of the agencies has been liberally construed by the courts; *see* Brovelli v. Superior Court, 56 Cal. 2d 524, 527-29, 364 P.2d 462, 464-65, 15 Cal. Rptr. 630, 632-33 (1961). *See also* CAL. GOV'T CODE § 11189 (West 1980) which provides:

> "In any matter pending before him a department head *may cause the deposition of persons* residing within or without the State to be taken by causing a petition to be filed in the Superior Court in the County of Sacramento reciting the nature of the matter pending, the name and residence of the person whose testimony is desired, and asking that an order be made requiring him to appear and testify before an officer named in the petition for that purpose. Upon the filing of the petition the court may make an order requiring the person to appear and testify in the manner prescribed by law for like depositions in civil actions in the superior courts of this State. In the same manner the superior courts may compel the attendance of persons as witnesses, the production of papers, books, accounts, and documents, and may punish for contempt." (emphasis added).

A state agency thus has the power to subpoena both parties and non-parties to take depositions. Typically, the accused and his records are subpoenaed during the investigatory phase, and efforts are made to secure admissions and statements before the accused knows

Numerous commentators have argued for the adoption of full civil discovery powers by an accused in order to offset the state's adjudicative advantage.[5] The state agency serves a combination of functions in the disciplinary proceedings. It not only files the accusation, but is a party to the proceedings, as well as being the ultimate decisionmaker. In recognition of this imbalance favoring the state, reciprocal discovery rules should be afforded the accused to insure a fair hearing.[6] Indeed, the United States Supreme Court has acknowledged that fundamental fairness may require no less.[7]

Over twelve years ago in *Shively v. Stewart*,[8] the California Supreme Court set a national lead in expanding the prehearing discovery powers of an accused in a professional disciplinary proceeding.[9] In *Shively*, the State Board of Medical Examiners brought a disciplinary action to revoke the medical licenses of petitioners, John P. Shively and Seymour Smith, for performing illegal abortions. Pursuant to Government Code section 11510,[10] the peti-

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the full extent of the claims which will be made against him.

5. *See* Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up With the Courts*, 46 A.B.A.J. 74 (1960); Kaufman, *Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques Against Delay?—A Judge's View*, 12 AD. L. REV. 103 (1959-60); Comment, *Discovery in State Administrative Adjudication*, 56 CALIF. L. REV. 756 (1968); Comment, *Discovery Prior to Administrative Adjudications—A Statutory Proposal*, 52 CALIF. L. REV. 823 (1964); Comment, *Quasi-Judicial Administrative Hearings: Is a Dual System of Discovery Necessary?*, 7 U.S.F. L. REV. 306 (1973).

6. The Administrative Conference of the United States, recognizing a similar imbalance in the federal administrative process, has recommended that each agency adopt certain minimum discovery requirements, including depositions. *See* RECOMMENDATION No. 30, S. DOC. No. 24, 88th Cong., 1st Sess. 37 (1963), which recommends permitting each agency to adopt discovery rules "to the extent and in the manner appropriate to its proceedings." *See also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1 RECOMMENDATIONS & REPS. (1968-1970). RECOMMENDATION No. 21, *id.* at 37, lists the minimum discovery requirements that Federal Administrative Agencies should adopt; *see generally* Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89. Only a few federal agencies have followed the Conference's proposals, with the majority of them still holding out.

In California, the assembly passed administrative discovery bills in 1963 and 1965 which provided for the use of both depositions and interrogatories, but they died in the Senate Committee. *See* Comment, *Discovery in State Administrative Adjudication*, *supra* note 5, at 756-58. It is clear that the agencies—both federal and state—are fighting every inch of the way to retain their adjudicative advantage at the expense of the accused's right to know all the facts behind the charges against him and to prepare an adequate defense.

7. *See* Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); for a thorough discussion of these cases see notes 44-53 and accompanying text *infra*.

8. 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966).

9. *Id.* at 479, 421 P.2d at 68, 55 Cal. Rptr. at 220.

10. CAL. GOV'T CODE § 11510 (West 1980) provides:

"(a) Before the hearing has commenced the agency, or the assigned hearing officer, shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Compliance with the provisions of Section 1985 of

tioners requested the respondent hearing officer to issue four subpoenas duces tecum to secure prehearing depositions of the Board's attorney and executive secretary and for the production of documents. The petitioners' request was denied. On appeal, the California Supreme Court reversed. Chief Justice Traynor, speaking for a unanimous court, analogized between the position of a professional facing disciplinary proceedings and that of a defendant in a criminal trial: "[a] disciplinary proceeding [like a criminal trial] has a punitive character, for the agency can prohibit an accused from practicing his profession."[11] In view of this potentially harsh outcome and the agency's multiple roles in the hearing process, procedural safeguards in the form of deposition and discovery rules were deemed necessary to enable the petitioners to prepare an adequate defense and to promote a fair hearing.

The *Shively* decision followed a general trend in the California courts establishing pretrial discovery as an integral part of both

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the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena duces tecum. After the hearing has commenced the agency itself hearing a case or a hearing officer sitting alone may isue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend at a place out of the county in which he resides unless the distance be less than 150 miles from his place of residence except that the agency, upon affidavit of any party showing that the testimony of such witness is material and necessary, may endorse on the subpoena an order requiring the attendance of such witness.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the State or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed."

Under former Government Code section 11510(a), the *Shively* Court held that the issuance of a subpoena duces tecum was a ministerial act to which the agency or hearing officer has no discretion, whether the subpoena was for the production of evidence at the hearing or for prehearing discovery purposes. Thus the *Shively* holding allows an accused to invoke the agency's subpoena power to secure prehearing depositions. However, the 1968 amendment to CAL. GOV'T CODE § 11510 and the enactment of CAL. GOV'T CODE §§ 11507.5 and 11507.6 have limited the *Shively* ruling by eliminating the use of depositions and other discovery tools by an accused.

11. 65 Cal. 2d at 480, 421 P.2d at 68, 55 Cal. Rptr. at 220. *See* Reich, *The New Property*, 73 YALE L.J. 733, 751-55, 781, 784 (1964).

the civil and criminal judicial process.[12] The rationale behind liberalizing discovery procedures was to enhance fairness by reducing the possibility of surprise at trial. Through the use of discovery procedures, the trial was to become less a game of blindman's bluff and more a process of ascertaining the truth.[13]

Two years after *Shively*, the California legislature enacted sections 11507.5 and 11507.6 of the Administrative Procedure Act (APA)[14] which set forth the discovery rights of an accused in an administrative disciplinary proceeding. The legislation severely limited the *Shively* ruling by making the most useful discovery tools—depositions, requests for admissions, examinations, inspections and interrogatories—unavailable to an accused.[15] Subsequent case law has interpreted the statute to allow the use of written interrogatories, but other discovery techniques are still not available.[16]

The current state of administrative discovery is analogous to a patchwork quilt, where some professional licensing agencies in fact do grant the full panoply of civil discovery devices while most do not.[17] One such exception is Education Code section 44944, which

12. California has provided for liberal pretrial discovery since the 1957 enactment of the discovery provisions in the Code of Civil Procedure. CAL. CIV. PROC. CODE §§ 2016-2036 (West 1955 & Supp. 1980). *See also*, the landmark decision of Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 364 P.2d 266, 275, 15 Cal. Rptr. 90, 99 (1961), in which the court construed those provisions broadly in light of the important policy considerations underlying that legislative enactment. For a thorough analysis of the development of California's criminal discovery, see Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

13. *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); Hickman v. Taylor, 329 U.S. 495, 507 (1947); *see also* Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944-46 (1961).

14. CAL. GOV'T CODE §§ 11500-11528 (West 1980). *See* note 3 *supra* for the text of sections 11507.5 and 11507.6.

15. CAL. GOV'T CODE § 11511 (West 1980) provides for depositions for purposes of perpetuating testimony if a witness will be unable to or cannot be compelled to attend the hearing. This type of deposition must be distinguished from discovery depositions. *See* notes 73-74 and accompanying text *infra*. *See also* Shively v. Stewart, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966), in which Chief Justice Traynor emphasized this distinction, in stating that Government Code section 11511 "provides for depositions, not for the purpose of discovery, but to secure evidence for use at the hearing." 65 Cal. 2d at 479, 421 P.2d at 67, 55 Cal. Rptr. at 219.

16. *See* Romero v. Hern, 276 Cal. App. 2d 787, 81 Cal. Rptr 281 (1969), in which the court gave a liberal interpretation to the words "written request" to include interrogatories, recognizing that "modern concepts of administrative adjudication" require the use of interrogatories in conjunction with CAL. GOV'T CODE § 11507.6, even though such a discovery tool was not specifically provided by statute.

17. California provides broader discovery rights than under the Administrative Proce-

expressly provides that the scope of discovery is not limited to that of the Administrative Procedure Act but is instead governed by the Civil Discovery Act.[18] In *Brotsky v. State Bar*,[19] the California Supreme Court afforded attorneys the full scope of civil discovery when subject to disciplinary proceedings on the premise that the State Bar was but an arm of the court and not an administrative agency in the ordinary sense of the phrase.[20] The result is that attorneys and teachers benefit from the protection of full civil discovery rights while most other professions subject to similar disciplinary proceedings do not.[21]

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dure Act to several distinct classes. In 1972, California school teachers in the kindergarten through twelfth grade programs obtained full discovery rights with regard to hearings under CAL. EDUC. CODE § 44944 (West 1978 & Supp. 1980). Two years later, this protection was extended to junior college teachers and administrators pursuant to CAL. EDUC. CODE § 87675 (West 1978). These sections expressly indicate that discovery is not limited to that provided for under the Administrative Procedure Act.

California civil service employees obtained their discovery rights in 1963 under CAL. GOV'T CODE § 19574.1 (West 1980). The California Supreme Court has left it an open question as to whether full civil discovery is available to these employees. *See* Nightingale v. State Personnel Bd., 7 Cal. 3d 507, 518, 498 P.2d 1006, 1014, 102 Cal. Rptr. 758, 766 (1972). Blind vendors holding licenses for sales kiosks in public buildings were benefitted with arbitration discovery in 1977. CAL. WELF. & INST. CODE § 19635 (West 1980). There is full civil discovery as authorized by the arbitration discovery statute. CAL. CIV. PROC. CODE § 1283.05 (West 1972).

Under Government Code Section 68753, the Commission of Judicial Qualifications is empowered with the discretion to order the taking of a deposition in a pending investigation or formal proceeding. There is only a requirement of a "minimal showing of good cause" on the part of the judge under investigation. *See* McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).

18. CAL. EDUC. CODE § 44944 (West Supp. 1978) provides:

"(a) In the event a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code; provided, however, that the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency therein, except that *the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court.* In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such continuance; provided, however, that such extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section."(emphasis added).

19. 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962).

20. *Id.* at 300, 368 P.2d at 703, 19 Cal. Rptr. at 159.

21. Although the focus of this note is on due process considerations of administrative

This note will examine the constitutional aspects of prehearing discovery in light of recent United States Supreme Court decisions involving procedural due process in quasi-judicial administrative proceedings, particularly that of license revocation proceedings. The criminal law analogy first presented in *Shively* will be discussed and it will be suggested that administrative discovery should be broader than criminal discovery because of the unique characteristics of the administrative process. Finally, the statutory and case law since *Shively* will be analyzed and it will be argued that the limited discovery provisions of California's Administrative Procedure Act deprive the accused in a license revocation proceeding of due process of law.

I. Procedural Due Process

Initially, one of the obtacles to the imposition of due process

discovery rights, it is important to mention that this disparate treatment accorded professionals facing similar disciplinary proceedings raises a possible equal protection challenge under both the state and federal constitutions. Traditional equal protection analysis consists of a two-tier approach for reviewing state legislative classifications. Under the less intensive standard of review, the classification scheme need only be rationally related to a legitimate state purpose to be upheld as constitutional. This standard has been described as providing "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The stricter standard of review requires that the classification be necessary to achieve a compelling state interest. This "strict scrutiny" standard is triggered when a fundamental right or a suspect classification is involved.

The California Supreme Court has recognized that the right to practice a profession is a vested fundamental right and should be protected from untoward intrusion by the massive apparatus of government. *See* Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). Likewise, the United States Supreme Court has listed the right of an individual "to engage in any of the common occupations of life" as one of several fundamental liberties. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Furthermore, the Court has noted that where there is threat of governmental deprivation of an individual's life, liberty or property, the individual's right to procedural fairness is deemed "fundamental" and deserving of strict scrutiny. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Sniadach v. Family Finance Corp., 395 U.S. 377 (1969); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 418-19 (1978).

Once the strict scrutiny standard is invoked the state then has the burden to show that a compelling interest exists to justify the disparate classification. Any conceivable state interests of summary adjudication and administrative efficiency in limiting discovery powers under California's Administrative Procedure Act are not compelling to justify the discriminatory treatment of professional licensees with respect to their rights to prepare an adequate defense and to effectively cross-examine adverse witnesses. Moreover, the statutory restriction of discovery fails to serve the state's objectives of expediting the proceedings since it may lead to unnecessary continuances of the hearing when surprise results from the testimony of non-deposed key witnesses.

requirements upon administrative licensing proceedings was the "right-privilege" distinction.[22] A license to practice a profession was regarded as a privilege and not a vested right; therefore the state could grant, condition or revoke a professional license without complying with the due process guarantees of the Fourteenth Amendment. However, the right-privilege distinction has eroded over the years[23] and its demise means that state administrative agencies are no longer immune from the procedural requirements of the Fourteenth Amendment.

In *Greene v. McElroy*,[24] the United States Supreme Court recognized that the right to pursue a chosen profession free from unreasonable governmental interference is within the concepts of "liberty" and "property" protected by the due process clause.[25] In *Greene*, a government agency withdrew its security clearance of a private defense company's employee, rendering him useless to the employer. Discussing the lack of opportunity to confront and cross-examine those whose accusations deprived the employee of his livelihood, the Court stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on the fact findings, the evidence used to prove the government's case *must be disclosed* to the individual so that he has an opportunity to show that it is untrue.[26]

The *Greene* Court emphasized the right to procedural due process, at least the right to confrontation and cross-examination, where significant consequences are involved.

Exactly what process is due was first addressed by the United States Supreme Court in the landmark case of *Goldberg v. Kelly*,[27] which involved the termination of welfare benefits without a prior hearing. The *Goldberg* Court, abandoning the right-privilege distinction, held that procedural due process requires notice and a pre-termination evidentiary hearing before an individual can be deprived of a vital interest.[28] Justice Brennan, writing for the ma-

22. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); *see also* Graham v. Richardson, 403 U.S. 365, 374 (1971); *but see* Note, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165 (1979).

23. *See, e.g.*, Van Alstyne, *supra* note 22.

24. 360 U.S. 474 (1959).

25. *Id. See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

26. 360 U.S. at 496 (emphasis added).

27. 397 U.S. 254 (1970).

28. *Id.* at 262.

jority, applied a balancing test in determining that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[29] Although the Court in *Goldberg* stated that the hearing need not take the form of a full adjudication, it did hold that a hearing closely approximating a judicial trial was required.[30] The Court listed those procedural safeguards which "rudimentary due process" required to insure a meaningful hearing: timely and adequate notice, an opportunity to confront and cross-examine adverse witnesses, the right to retain counsel, and the right to an impartial decisionmaker.[31] Additionally, the "balancing of interests" approach taken in *Goldberg* became the accepted approach for determining what procedure is due.[32]

It was not until *Morrissey v. Brewer*[33] that the Supreme Court further elaborated on the requirements of due process. Chief Justice Burger, applying *Goldberg's* "balancing of interests" analysis, formulated a two-stage procedure for parole revocation hearings which satisfied minimum due process. The parolee was first entitled to an informal preliminary hearing at the place of arrest with some provisions for live testimony. Then, a final revocation hearing was to be held which would include the right to written notice, the *right to disclosure* of evidence against him, and the right to confront and cross-examine adverse witnesses among other rights.[34]

The *Morrissey* Court recognized the important discovery function of the preliminary hearing as a means for gathering and pre-

29. *Id.* at 262-63 (citation omitted).

30. *Id.* at 266.

31. *Id.* at 267-71. But note that recent Supreme Court decisions suggest a retreat from the *Goldberg*-type hearing requirement, wherein a flexible due process standard has been adopted to suit the particular needs of the administrative agency involved. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977)(student corporal punishment); Mathews v. Eldridge, 424 U.S. 319 (1976)(social security disability benefits); Arnett v. Kennedy, 416 U.S. 134 (1974)(federal civil service employees); *but cf.* Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1974)(limiting *Arnett's* holding in California); *see generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

32. In the plurality opinion of Arnett v. Kennedy, 416 U.S. 134 (1974), six Justices engaged in the "balancing of interests" test articulated in *Goldberg* to arrive at their differing results. *See id.* at 167-69 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part); *id.* at 193-96 (White, J., concurring in part and dissenting in part); *id.* at 217-26 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting).

33. 408 U.S. 471 (1972).

34. *Id.* at 489 (emphasis added).

serving information while "fresh . . . sources are available."[35] Moreover, the Court held that due process requires the state to disclose its evidence to the accused. However, the precise extent to which disclosure is compelled by the due process clause was not elaborated on by the Court.[36]

Goldberg and *Morrissey* make clear that where important personal rights are at stake, due process requires that some form of hearing be afforded an accused prior to the termination of those rights. To insure a meaningful process, the right to a hearing must include certain essential peripheral rights including, as indicated in *Morrissey*, providing the accused with the means to gather and preserve facts. The tools of discovery were designed primarily for that purpose. Full discovery rights would provide an accused licensee a method of ascertaining the existence and location of evidence to be used against him and would minimize the inherent advantage of the state's investigative powers, thereby furthering the fairness of the hearing.[37]

II. The Criminal Law Analogy

A. The Scope of Criminal Discovery in the Federal Courts

Although recent United States Supreme Court decisions have not explicitly dealt with the issue of pretrial discovery, they have implicitly acknowledged a criminal defendant's right to discovery by imposing a duty on the state to disclose its evidence to the accused. In *Clewis v. Texas*,[38] the Supreme Court stated in a footnote that, "in some circumstances, it may be a denial of due process for a defendant to be refused any [pretrial] discovery of his statements to the police."[39] Additionally, the Court has specifically recognized a duty on the part of the prosecution to disclose exculpatory evidence to a criminal defendant. In *Brady v. Maryland*,[40]

35. *Id.* at 485. In fact, the provision for live testimony at the preliminary hearing where an accused has the opportunity to cross-examine the state's adverse witnesses is similar to the taking of a deposition by a civil litigant.

36. *But see* Brady v. Maryland, 373 U.S. 83 (1963), where the failure of the prosecution to disclose exculpatory evidence to an accused in a criminal trial was held to be a denial of due process, *discussed in* Part II, *see* notes 40-43 and accompanying text *infra; see also* Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

37. *See* Berger, *supra* note 5, Kaufman, *supra* note 5.

38. 386 U.S. 707 (1967).

39. *Id.* at 712 n.8.

40. 373 U.S. 83 (1963).

Justice Douglas, writing for the majority, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[41] Considerable disagreement remains as to the exact nature of the prosecutor's duty to disclose.[42] However, lower courts have suggested that *Brady* establishes a constitutional right to pretrial discovery, at least as to exculpatory evidence.[43]

While the specific scope of constitutionally mandated pretrial discovery has yet to be decided by the Supreme Court, two recent cases have made it clear that reciprocal discovery rights between the criminal defendant and the state are required by due process.[44] In *Williams v. Florida*,[45] the Supreme Court upheld Florida's notice-of-alibi rule[46] as not violating the due process clause. The Court's rationale for holding the rule free of due process infirmity was that it was "carefully hedged with reciprocal duties requiring state disclosure to the defendant [of the state's alibi rebuttal witnesses]."[47] In noting Florida's overall liberal discovery rules on behalf of the defendant,[48] the Court reflected that the adversary system is:

> not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the

41. *Id.* at 87; *see also In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971)(California's counterpart to *Brady*).

42. *See* Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

43. *See* United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972). As a practical matter, disclosure of exculpatory evidence may be of little effect at the time of trial given the great likelihood of plea-bargaining at the pretrial stage.

44. Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970).

45. 399 U.S. 78 (1970).

46. FLA. R. CRIM. P. § 1.200 requires a defendant, upon written demand by the prosecution, to give notice in advance of trial if the defendant intends to rely on an alibi, and to disclose to the prosecution the place where defendant claims to have been and the names and addresses of his alibi witnesses. The prosecution in turn must disclose to the defense the names and addresses of the witnesses the state proposes to offer to rebut the alibi. Failure to comply with this rule may result in the exclusion of defendant's alibi evidence at trial, except for defendant's own testimony, or, with respect to the state, exclusion of the rebuttal evidence. *See* 399 U.S. at 104.

47. 399 U.S. at 81.

48. FLA. R. CRIM. P. § 3.220(d) allows depositions for discovery purposes by the defendant of the state's adverse witnesses without the limitation that the witness be unable to attend trial. *See also* Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 450 n.77 (1972). Besides Florida, Vermont, Ohio and Texas provide for criminal discovery depositions.

> instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[49]

Following the *Williams* rule requiring reciprocity, the Supreme Court, in *Wardius v. Oregon*,[50] invalidated an Oregon notice-of-alibi statute[51] because neither the statute nor other Oregon law provided the defendant with sufficient reciprocal rights of discovery to make criminal discovery the "two-way street" required by due process. The Court found no "balance of forces between the accused and his accuser."[52] The Court also noted that "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor."[53]

Despite the Supreme Court's reluctance to set forth explicit standards for pretrial discovery by a criminal defendant, its holdings in *Williams* and *Wardius* indicate that at least reciprocal discovery rights between the accused and the state are required to satisfy due process. Thus, while the criminal defendant may not be constitutionally entitled to examine all the state's evidence against him, neither is the state entitled to discover the accused's defenses without tipping its hand in return. One exception to the reciprocity requirement is the prosecutor's duty to disclose exculpatory evidence to an accused. Any adjudicative advantage therefore falls on the side of the accused.

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49. 399 U.S. at 82; *see also* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 292.

50. 412 U.S. 470 (1973).

51. OR. REV. STAT. § 135.875 provided:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed." (renumbered in 1969 as § 135.455).

52. 412 U.S. at 474.

53. *Id.* at 475 n.9. When presented with a similar notice-of-alibi rule as Oregon's, the California Supreme Court, in Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974), deferred to the legislature's rulemaking power to promulgate a notice-of-alibi statute and thereby avoided deciding the complex and closely balanced questions of state and federal constitutional law.

B. The Scope of Criminal Discovery in California

In *People v. Riser*,[54] the California Supreme Court held that a criminal defendant had the right to obtain, at trial, statements made by a prosecution witness to the police. As Justice Traynor, writing for the majority, stated:

> Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case. . . . To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.[55]

Riser reinforces "the fundamental proposition that [the accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information."[56]

The California Supreme Court has extended the *Riser* rationale to permit pretrial discovery on behalf of the criminal defendant when it would be in the interests of fundamental fairness to do so.[57] Conversely, the California Supreme Court has also extended the prosecution's right to pretrial discovery. In *Jones v. Superior Court*,[58] the defendant was required to reveal to the prosecution the names of his witnesses on the ground that discovery procedures should not be a "one-way street."[59] Furthermore, in *Jones*, the discovery procedure was held not to violate the defendant's privilege against self-incrimination since "[i]t simply requires petitioner to disclose information that he will shortly reveal [at trial] anyway."[60] Although the court in *Jones* stated that pretrial discovery was not constitutionally compelled by due process,[61] it recognized the possibility that a criminal defendant should be "permit-

54. 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930, *overruled on other grounds in* People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).

55. 47 Cal. 2d at 586, 305 P.2d at 13.

56. *Id.* (citations omitted).

57. *See* Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959)(establishing the right of an accused to pretrial inspection of statements made to the prosecution by third persons); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957)(establishing the right of an accused to discover his statements before trial); *see generally* Louisell, *supra* note 12, at 78-80; *see also* Traynor, *supra* note 12, at 244-45.

58. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

59. *Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

60. *Id.* at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

61. *Id.* at 59, 372 P.2d at 921, 22 Cal. Rptr. at 881.

ted discovery . . . when necessary to insure due process of law."[62] Indeed, the "two-way" street principle enunciated in *Jones* echoes the due process requirement of reciprocity discussed by the United States Supreme Court in *Williams* and *Wardius*.[63]

While recognizing a criminal defendant's due process right to pretrial discovery of certain information,[64] the California courts have yet to recognize an accused's constitutional right to one of the most useful discovery techniques—pretrial depositions.[65] In *People v. Bowen*,[66] the court of appeal affirmed the trial court's denial of defendant's motion to depose the victim's four-year-old son on the ground, among others, that a criminal defendant has no inherent unqualified right to take depositions of prosecution witnesses prior to trial.[67]

In a recent California Supreme Court case, *People v. Municipal Court (Runyan)*,[68] the majority reaffirmed that procedural due process does not entitle a criminal defendant to depose prosecution witnesses pretrial. In *Runyan*, the defendant, charged with drunk driving and obstructing a police officer in the discharge of his duty, sought to depose the officers involved. The municipal court granted defendant's motion to take the deposition, but the supreme court reversed on the ground that the trial court had exceeded the limit of its inherent power to order discovery in criminal cases.[69] The court held that Penal Code sections 1335 through 1345 operated to restrict the use of criminal depositions to those cases where the prosecution witness would be unavailable at trial.[70] The majority rejected defendant's procedural due process argument while noting that the defendant was not without sufficient alternative means of getting pretrial discovery.[71]

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62. *Id.*

63. *See* notes 44-53 and accompanying text *supra*.

64. *See* note 57 and accompanying text *supra*.

65. The leading states in this area are Florida, Vermont, Ohio and Texas, which provide for discovery depositions by a criminal defendant. *See* Nakell, *supra* note 48, at 450 n.77.

66. 22 Cal. App. 3d 267, 99 Cal. Rptr. 498 (1971).

67. *Id.* at 278-79, 99 Cal. Rptr. at 504-05. The *Bowen* Court did note, however, that, under the circumstances, the trial judge should have issued a subpoena for the minor's appearance at an "in chambers" session where discovery could have been conducted under the court's supervision. *Id.* at 281, 99 Cal. Rptr. at 506.

68. 20 Cal. 3d 523, 574 P.2d 425, 143 Cal. Rptr. 609 (1978).

69. *Id.* at 528, 574 P.2d at 427, 143 Cal. Rptr. at 611.

70. *Id.* at 528-30, 574 P.2d at 428-29, 143 Cal. Rptr. at 611-13.

71. *Id.* at 530-31, 574 P.2d at 429, 143 Cal. Rptr. at 612-14. The alternative means considered by the *Runyan* Court included obtaining copies of the preliminary hearing or grand jury transcripts, police reports, witness' statements, or by conducting voluntary inter-

Chief Justice Bird wrote a strong dissent in *Runyan*,[72] basing her argument upon a fundamental distinction between two separate kinds of depositions.[73] The Chief Justice drew a distinction, supported by legislative history, between depositions for the purpose of perpetuating testimony for trial and depositions for the purpose of pretrial discovery. She argued that the challenged constitutional provision and statutes[74] concerned testimony preservation and, that therefore, there was legislative silence as to discovery depositions.[75] In light of the legislative silence, she argued, *Shively* was thus applicable to *Runyan* and the trial court should have been permitted to exercise its broad inherent powers to grant discovery depositions.[76] The Chief Justice left open the possibility that, in a given case, pretrial discovery might be constitutionally compelled by due process.[77]

The *Runyan* holding was seriously questioned in *Hawkins v. Superior Court*.[78] In *Hawkins*, the denial of an adversarial preliminary hearing to a criminal defendant indicted by a grand jury was held to deprive the accused of equal protection of the laws. The *Hawkins* Court cited with approval the United States Supreme Court case of *Coleman v. Alabama*,[79] in which the preliminary hearing was deemed a "critical stage" of the criminal process and was recognized for its valuable discovery function. The *Coleman* Court held that the preliminary hearing serves not only as the accused's initial opportunity to be advised of the state's case against him but it also permits a skilled defense counsel to interrogate prosecution witnesses. It thus serves as a vital impeachment tool to an accused in later cross-examination of the state's witnesses at

views of prosecution witnesses. *But cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1181-82 (1960). According to Professor Goldstein, statements of government witnesses are no substitute for discovery deposition procedures since the witnesses are not subject to cross-examination by defense counsel; also the voluntary interviewing of government witnesses by the defendant is an unrealistic alternative, given the fact that "more often than not, . . . [witnesses] have been advised not to discuss their testimony with [the defendant]. Without the subpoena, he can do nothing effective to break the wall of silence." *Id.* at 1182 (footnote omitted).

72. 20 Cal. 3d at 533, 574 P.2d at 430, 143 Cal. Rptr. at 614 (Bird, C.J., dissenting).

73. *Id.* at 533, 574 P.2d at 431, 143 Cal. Rptr. at 615.

74. CAL. CONST. art. 1, § 13; CAL. PENAL CODE §§ 1335-1345 (West 1970).

75. 20 Cal. 3d at 538-43, 574 P.2d at 433-37, 143 Cal. Rptr. at 617-21.

76. *Id.* at 545, 574 P.2d at 438, 143 Cal. Rptr. at 622.

77. *Id.* at 537 n.4, 574 P.2d at 433 n.4, 143 Cal. Rptr at 617 n.4.

78. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

79. *Id.* at 588, 586 P.2d at 918, 150 Cal. Rptr. at 437 (citing Coleman v. Alabama, 399 U.S. 1, 9-10 (1970)).

trial.[80] Consequently, the two alternatives to discovery depositions mentioned in *Runyan*, the grand jury transcript and the voluntary interviewing of prosecution witnesses by the defendant, were deemed by the *Hawkins* Court not to be adequate substitutes for the adversarial preliminary hearing where an accused may conduct probing cross-examination of the state's adverse witnesses. Absent any subpoena power a criminal defendant has no other reasonable means to compel the cooperation of hostile witnesses.[81]

Hawkins reflects a trend in the California courts towards acknowledging the practical realities facing an accused in securing pretrial discovery. A defendant indicted by way of a grand jury is placed at a distinct disadvantage *vis-a-vis* an individual charged by information. The use of the grand jury transcript does not provide a method of discovery comparable to that of live cross-examination at a preliminary hearing since the prosecutor, who alone conducts the grand jury questioning, is not likely to develop facts which will aid the defense. According to one scholar, the grand jury hearing can be used as "a full-fledged deposition procedure for the prosecution without the embarrassing presence of defendant or his counsel."[82] The grand jury is but a "captive of the prosecutor," thereby allowing him to "indict anybody . . . before any grand jury."[83] Indeed, the grand jury has even been equated to an administrative agency of the prosecution.[84]

The *Hawkins* Court considered the grand jury's dual role of accuser and factfinder to be the main cause of its lack of independence.[85] In this respect the grand jury is analogous to an administrative agency with its multiple roles of accuser, factfinder and ultimate decisionmaker. The combination of functions found in administrative agencies is thought to diminish greatly the objectivity of their final determinations and to increase the risk of prejudice against the accused. It is, therefore, important to provide an accused licensee with a full range of discovery tools prior to an administrative hearing to offset the state's adjudicative advantage.

In light of the California Supreme Court's recognition of the

80. 22 Cal. 3d at 588, 586 P.2d at 918-19, 150 Cal. Rptr. at 437-38.

81. *Id.* at 589, 586 P.2d at 919, 150 Cal. Rptr. at 438. *See also* Goldstein, *supra* note 71, at 1182.

82. Goldstein, *supra* note 71, at 1191.

83. Hawkins v. Superior Court, 22 Cal. 3d at 590, 586 P.2d at 919, 150 Cal. Rptr. at 438 (citation omitted).

84. *See* Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N.M.L. REV. 141, 142 (1972).

85. 22 Cal. 3d at 591, 586 P.2d at 920, 150 Cal. Rptr. at 439.

fundamental right of a criminal defendant to secure pretrial information through the preliminary hearing, whether he be indicted by information or by grand jury, an accused licensee should be insured equivalent procedural safeguards. The use of pretrial depositions in administrative proceedings would achieve discovery goals similar to those of a preliminary hearing.[86]

C. Beyond the Scope of Criminal Discovery: The Need for Broader Discovery Rights for an Accused in a License Revocation Proceeding

In addition to the right to a preliminary hearing recognized in California, the criminal defendant is protected by procedural safeguards not paralleled in administrative proceedings. The defendant is presumed innocent until proven guilty,[87] enjoys a privilege against self-incrimination,[88] and must be proven guilty beyond a reasonable doubt.[89]

In contrast, a license revocation hearing generally affords the licensee very few procedural safeguards.[90] An administrative hearing is not conducted according to the rules applicable to a full-fledged trial. The rules of evidence are relaxed,[91] and the state must meet a lower standard of proof.[92] Furthermore, unlike a crim-

86. *See* notes 78-80 and accompanying text *supra*.

87. CAL. PEN. CODE § 1096 (West 1970).

88. CAL. PEN. CODE §§ 1324, 1324.1 (West 1970). The privilege against self-incrimination is also guaranteed under the United States Constitution, U.S. CONST. amend. V, and the California Constitution, CAL. CONST. art. 1, § 15.

89. CAL. PEN. CODE § 1096 (West 1970).

90. Notice and pleading requirements serve as the initial procedural safeguard by informing an accused of the specific nature of the charges made against him. According to Professor Davis, "[t]he most important characteristic of pleadings in the administrative process is their unimportance." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8.04, at 523 (1958 & Supp. 1980). *See also* Kaufman, *supra* note 5, at 107. Judge Kaufman notes that the underlying rationale for relaxing pleading requirements in the federal courts was the concomitant adoption of liberalized discovery procedures.

91. CAL. GOV'T CODE § 11513(c) (West 1980) provides:

"(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded."

92. *See* Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 940, 123 Cal.

inal defendant, an accused licensee is not presumed innocent and has no privilege against self-incrimination.[93]

The accused in an administrative disciplinary proceeding may be subject to punishment equal to or more severe than that to which a criminal defendant is subject. License revocation proceedings may permanently deprive a person of the livelihood for which he or she has trained over a period of many years. Indeed, the revocation of a license may be even more stigmatizing than the imposition of a criminal sentence or fine,[94] and yet the accused licensee is afforded less protection from unfair judicial process.

In determining the boundaries of due process the courts have engaged in a balancing test, weighing the government's interest in administrative efficiency against the importance of the private interest to be protected.[95] Certainly the gravity of the loss threatened in license revocation hearings necessitates the imposition of maximum procedural safeguards.[96]

The main obstacle to the implementation of broad discovery rights as part of the criminal process is the defendant's privilege against self-incrimination as guaranteed by the Fifth Amendment.[97] Such a privilege is not present in the administrative process;[98] therefore, there is no constitutional impediment to adopting broad discovery procedures. Moreover, the due process requirement of adequate notice and a fair hearing may even compel the adoption of broader discovery procedures in order to balance the forces between the accused licensee and the state.

Rptr. 563, 569 (1975).

93. CAL. GOV'T CODE § 11513(b) (West 1980) provides in pertinent part: "If respondent does not testify in his own behalf he may be called and examined as if under cross-examination." *See also* Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 940, 123 Cal. Rptr. 563, 569 (1975), in which the court refused to consider appellant's challenge of the constitutional validity of this statute.

94. In *Shively v. Stewart*, Chief Justice Traynor noted that "[t]he criminal law analogy is appropriate [in license revocation proceedings]." 65 Cal. 2d at 479, 421 P.2d at 68, 55 Cal. Rptr. at 220. For an excellent discussion of the similarity between agency adjudication and criminal proceedings *see* Comment, *Discovery in State Administrative Adjudication*, 56 CALIF. L. REV. 756, 776-78 (1968). *See also* CAL. BUS. & PROF. CODE § 6087 (West Supp. 1980), requiring the disbarred attorney in state bar disciplinary cases to notify his clients of his punishment which has a stigmatizing effect.

95. *See* notes 27-32 and accompanying text *supra*.

96. *See* Friendly, *supra* note 31 at 1297. In ranking various administrative proceedings on a scale from those requiring greatest procedural safeguards to those necessitating minimum protection, Judge Friendly places revocation of a license to practice a profession high on the scale requiring maximum procedural safeguards.

97. *See* Traynor, *supra* note 12, at 228; *see also* Nakell, *supra* note 48, at 437.

98. *See* note 93 *supra*.

A much touted excuse for administrative agencies to refuse discovery of their records to an accused licensee is that the privilege of confidentiality, which encourages the reporting of professional misconduct, will be lost. This argument does not withstand scrutiny. The United States Supreme Court in *Davis v. Alaska*[99] concluded that the state's interest in preserving the confidentiality of a juvenile's criminal history must be subordinated to a defendant's right to cross-examine a witness.[100] California courts have, in a number of recent cases, treated the confidentiality versus disclosure question as a balancing test, weighing the need for confidentiality against the accused's need to be informed of the charges against him and the evidence supporting or refuting the charges. In each case the fundamental fairness of allowing the accused access to records prevailed over the need for their confidentiality.[101]

Lastly, the opportunity for judicial review of adverse administrative rulings pursuant to the administrative mandamus statute, California Code of Civil Procedure section 1094.5,[102] is not a viable solution to the lack of discovery at the administrative level. Although the reviewing court may in the exercise of its independent

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99. 415 U.S. 308 (1974).

100. *Id.* at 319.

101. *See* County of Nevada v. Kinicki, 106 Cal. App. 3d 357, 165 Cal. Rptr. 57 (1980)(where AFDC records were made available during a paternity suit); Miller v. Superior Court, 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521, 523 (1977)(where policy of confidentiality of tax return gave way to more important policy requiring child support).

102. The pertinent sections of CAL. CIV. PROC. CODE § 1094.5 (West 1980) provide:

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

judgment[103] admit additional evidence, such evidence is limited to that which, "in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the [administrative] hearing."[104] The scope of discovery upon judicial review is even more restricted than at the initial administrative hearing. It is, therefore, necessary to provide full discovery at the administrative level.

III. State of the Law Since Shively

The *Shively* decision[105] represented a great leap forward in administrative discovery by allowing the use of depositions for discovery purposes, where no such provision existed under the then existing California Administrative Procedure Act.[106] The *Shively* Court recognized that the use of discovery depositions was necessary for the accused licensee to prepare an adequate defense and to promote a fair hearing. However, subsequent statutory and case law has severely limited the *Shively* holding.[107]

In *Everett v. Gordon*,[108] a case decided after *Shively* but prior to the enactment of Government Code sections 11507.5 and 11507.6, the California Court of Appeal held that licensed real estate brokers, subject to disciplinary proceedings before the Real Estate Commission, were not entitled to take the depositions of

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103. *See* Board of Dental Examiners v. Superior Court, 55 Cal. App. 3d 811, 127 Cal. Rptr. 865 (1976): "In reviewing revocation of a license by a state agency the court renders its independent judgment on the basis of the administrative record plus such additional evidence as may be [properly] admitted. . . ." *Id.* at 814, 127 Cal. Rptr. at 868.

104. CAL. CIV. PROC. CODE § 1094.5 (e) (West 1980) provides:

"(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case."

105. For a discussion of the *Shively* decision *see* notes 8-11 and accompanying text *supra*.

106. The California Administrative Procedure Act, CAL. GOV'T CODE §§ 11500-11528 (West 1980) was silent as to prehearing discovery at the time of *Shively*. It was not until 1968, two years after *Shively*, that the California legislature enacted CAL. GOV'T CODE §§ 11507.5 and 11507.6 which set forth the exclusive discovery devices available to an accused. For the full text of those code sections *see* note 3 *supra*.

107. *See* Cooper v. Board of Medical Examiners, 49 Cal. App. 3d 931, 123 Cal. Rptr. 563 (1975); Stevenson v. State Bd. of Medical Examiners, 10 Cal. App. 3d 433, 88 Cal. Rptr. 815 (1970); Romero v. Hern, 276 Cal. App. 2d 787, 81 Cal. Rptr. 281 (1969); Everett v. Gordon, 266 Cal. App. 2d 667, 72 Cal. Rptr. 379 (1968).

108. 266 Cal. App. 2d 667, 72 Cal. Rptr. 379 (1968).

material witnesses for general discovery purposes. The intermediate court interpreted the *Shively* ruling to permit an accused, upon a proper showing, to depose an executive employee of a public agency for a limited purpose.[109]

The *Everett* Court based its decision on the criminal law analogy drawn in *Shively*, but reached a different result. Relying on *Clark v. Superior Court*,[110] *the Everett* Court found that under Penal Code sections 1335 through 1345, a criminal defendant had a limited right to depose prosecution witnesses for evidentiary, but not for discovery, purposes.[111] Therefore, absent the proper statutory showing of the witnesses' unavailability, the prehearing depositions were not authorized.

The *Everett* decision represents a retreat from the general trend in the California courts towards allowing discovery. Moreover, it stands as a blatant contradiction to the basic rationale of *Shively*—that prehearing depositions safeguard the accused licensee's right to a fair hearing and enable the preparation of an adequate defense.

In contrast to *Everett*, the later court of appeal case of *Romero v. Hern*[112] represents a logical extension of the *Shively* principle. In *Romero*, a licensed farm labor contractor sought to compel the Labor Commissioner to answer interrogatories. While the disciplinary proceeding was pending, sections 11507.5 and 11507.6 of the Government Code[113] were enacted setting forth the exclusive methods of administrative discovery. Those sections did not specifically provide for interrogatories but the court of appeal interpreted the words "written request" liberally to include interrogatories.[114]

However, this expansion of the *Shively* ruling was restricted once again in *Stevenson v. State Board of Medical Examiners*.[115] In *Stevenson*, a physician, charged with employing an unlicensed assistant, petitioned the State Board of Medical Examiners to issue subpoenas to depose witnesses for discovery purposes pursuant to Government Code section 11511.[116] The petitioner sought to de-

109. *Id.* at 672-73, 72 Cal. Rptr. at 382.
110. 190 Cal. App. 2d 739, 12 Cal. Rptr. 191 (1961).
111. 266 Cal. App. 2d at 671, 72 Cal. Rptr. at 381.
112. 276 Cal. App. 2d 787, 81 Cal. Rptr. 281 (1969).
113. For the full text of CAL. GOV'T CODE §§ 11507.5 and 11507.6, *see* note 3 *supra*.
114. 276 Cal. App. 2d at 794, 81 Cal. Rptr. at 286.
115. 10 Cal. App. 3d 433, 88 Cal. Rptr. 815 (1970).
116. CAL. GOV'T CODE § 11511 (West 1980) provides:
"On verified petition of any party, an agency may order that the testimony of any mate-

pose physicians in his area of practice. The court of appeal held: that under *Shively* the Board's duty to issue subpoenas pursuant to Government Code section 11511 was discretionary rather than ministerial; that the depositions authorized by *Shively* were limited to questioning executive employees of an agency, not material witnesses; that prehearing discovery in *Shively* was intended to be limited to production of evidentiary material which a deponent had in his possession or under his control; and, finally, that petitioner failed to show the materiality of such depositions to the agency.[117]

The *Stevenson* Court misinterpreted *Shively* as authorizing only prehearing depositions of an agency's executive employees. Actually, the only limitation imposed by the *Shively* Court upon prehearing discovery is that it meet the good cause and materiality standards of Code of Civil Procedure section 1985.[118] To enable the petitioner to make such a showing, depositions of the Board's attorney and executive secretary were permitted in *Shively*. This, however, does not indicate any intention by the *Shively* Court to preclude deposing of material witnesses. *Stevenson's* interpretation of such an intention contradicts the rationale underlying *Shively*—that prehearing discovery should be available where necessary to give an accused licensee the opportunity to prepare an adequate defense. A material witness' testimony is often critical to the agency's final determination. This is especially true in proceedings involving the revocation of a physician's license where expert medical testimony plays a decisive role in the final outcome. Therefore, the opportunity to depose such witnesses prior to the hearing is vital to effective impeachment.

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rial witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefore in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code."

117. 10 Cal. App. 3d at 439, 88 Cal. Rptr. at 819.

118. "When the agency's subpoena power is invoked to secure discovery, the good cause and materiality requirements of Code of Civil Procedure section 1985 must be governed by discovery standards." Shively v. Stewart, 65 Cal. 2d 481, 421 P.2d at 69, 55 Cal. Rptr. at 221. Accordingly, the *Shively* Court allowed depositions to be taken of the Board's attorney and executive secretary to determine whether "good cause" existed for the production of other discoverable evidence.

A more recent case limiting the *Shively* decision is *Cooper v. Board of Medical Examiners.*[119] In *Cooper*, a psychologist, subject to disciplinary action for allegedly engaging in sexual intimacies with three female patients and for illegally prescribing drugs, contended that Government Code sections 11507.5 and 11507.6 constituted a denial of due process by limiting his opportunity to take prehearing discovery depositions. The court of appeal summarily rejected the constitutional attack on the statutes, stating only that appellant had failed to present persuasive authority on this issue. Citing *Shively, Everett, Romero* and *Stevenson* in support, the court went on to note that, "appellant had no commonlaw right to prehearing depositions."[120]

Cooper's reliance on the *Shively*-line of cases is misplaced, however, since the cited cases all affirm the basic principle first enunciated by Chief Justice Traynor in *Shively* that, "the law determining the adequacy of administrative hearings 'is mostly judge-made law . . .' and 'the standards are essentially the same whether judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law.' "[121] Indeed, the *Shively* Court deemed the authorization of depositions for discovery purposes to be an appropriate exercise of the trial court's inherent common law power.[122]

In examining the relevant case law since *Shively*, one finds that, with the exception of *Romero*, subsequent court decisions have erroneously interpreted *Shively's* holding. Notwithstanding these decisions, Chief Justice Traynor's rationale for expanding the scope of administrative discovery is still persuasive. As noted by several authorities in the field, *Shively's* sound and progressive result can be viewed as a model which other federal and state administrative agencies should follow.[123] Thus, despite the legislative and judicial attempts to limit its scope, *Shively* should remain the foundation for broadening administrative discovery procedures where necessary to insure fundamental fairness.

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119. 49 Cal. App. 3d 931, 123 Cal. Rptr. 563 (1975).

120. *Id.* at 945, 123 Cal. Rptr. at 572.

121. 65 Cal. 2d at 479, 421 P.2d at 68, 55 Cal. Rptr. at 220 (quoting 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 7.20, at 506 (1958)).

122. *Id.*

123. *See* B. SCHWARTZ, ADMINISTRATIVE LAW, § 98, at 279 (1976); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.04, at 523 (1958 & Supp. 1980).

Conclusion

For the past fifty years, the trend in both civil and criminal law has been to broaden the scope of pretrial discovery. In this area, administrative law lags behind. The rights affected, however, are as substantial. Professor Kenneth Davis, a leading authority in administrative law, has stated that, "[p]robably no sound reason can be given for failure to extend to administrative adjudications the discovery procedures worked out for judicial proceedings."[124] Indeed, full discovery procedures may be constitutionally compelled when the deprivation of a property interest is at stake, as in the case of license revocation proceedings where the means to an individual's livelihood is threatened.

In view of the broad investigatory powers of administrative agencies and their combination of functions, the full range of discovery devices is vital to counterbalance the state's adjudicative advantage and to insure the accused licensee's right to a fair hearing. Depositions are the most useful discovery tool to balance the state's investigatory powers because depositions help ascertain the existence and location of evidence, and shed some light on the general contents of privileged material. They are also extremely useful to impeach witnesses and to develop issues and defenses, especially when a witness' perception or recollection is critical to the case.[125]

Arguments against discovery—that it is expensive, will cause delay, and promote harassment or intimidation of witnesses—do not outweigh the arguments favoring discovery. Discovery minimizes gamesmanship and surprise at trial, and helps identify and narrow the issues, thereby expediting adjudication. Some commentators have noted that, "[t]he arguments against discovery are, in effect, the same arguments that have been made against the administrative process itself—that men can abuse the rights given them by law. The solution is not to deny those rights at all, but to tailor the law so that the abuses will be minimized."[126]

Much emphasis has been placed on safeguarding an accused's rights at the trial or hearing. However, the fact-gathering phase of litigation is equally important, if not more important. Judge J. Skelly Wright stated in *United States v. Bryant*[127] that criminal cases

124. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8.15, at 589.

125. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 103.

126. Comment, *Discovery Prior to Administrative Adjudications—A Statutory Proposal*, 52 CALIF. L. REV. 823, 845 (1964).

127. 439 F.2d 642 (D.C. Cir. 1971).

> point up an anomaly of our criminal process: controlled by rules of law protecting adversary rights and procedures at some stages, the process at other stages is thoroughly unstructured. Beside the carefully safeguarded fairness of the courtroom is a dark no-man's-land of unreviewed bureaucratic and discretionary decision making. Too often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages.[128]

This is also true of the administrative process, yet the accused licensee is afforded less procedural protection than a criminal defendant.

The California Supreme Court has recognized that the "right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection."[129] Full discovery rights should thus be available to all professional licensees facing administrative disciplinary proceedings.

128. *Id.* at 644.

129. Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 75, 435 P.2d 553, 559, 64 Cal. Rptr. 785, 791 (1968).